

# Competition Requirements under Indian Procurement Laws

CCI-SCOPE Workshop on *Public Procurement & Competition Law*

:: March 14<sup>th</sup>, 2012 ::

Sandeep Verma

sverma.ias@gmail.com

SSRN Author Page: <http://ssrn.com/author=1090557>

[www.BuyLawsIndia.com](http://www.BuyLawsIndia.com)

# For Starters:

- The views expressed in this Presentation are the personal, academic views of the Author and do not, in any manner, reflect the official position or policy of the Government of India, or any State Government, or any of their departments, offices or agencies.
- The provisions of the Draft Public Procurement Bill as mentioned in this presentation are those contained in the Revised Draft published by the Government on their website.



# Competition in Contracts

## *Some General Principles*

# Understanding Competition:

- Competition in Government Contracts is essentially a reflection on, and a function of, a potential bidder's confidence in the integrity of the procurement process.
- There is no such thing as perfect competition in a real world.
  - *Big versus Small*: Economies of Scale, Depth of Pockets
  - *New versus Incumbent*: Experience matters
  - *Domestic versus Foreign*: Differential Taxation, Subsidy and Regulatory regimes

# What affects Bidder Confidence in Government Procurements:

- Whether the technical and financial eligibility criteria will be reasonable so as to promote competition in terms of product eligibility and bidder eligibility?
- Whether decisions to award contracts will be fair and easy to understand?
- Whether complaints in respect of the above will be handled expeditiously, transparently and in a predictable and consistent manner?
- Whether payments will be made within reasonable time?
- Whether consistency and uniformity in contract performance will be ensured in terms of a level-playing field?

# The Procurement Life Cycle:

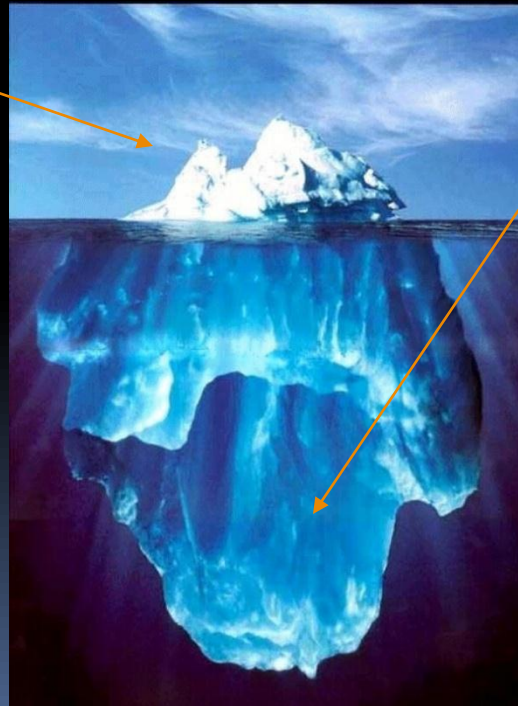
- Description of the Subject Matter of Procurement
- Requirements of Bidder Eligibility
- Selection of Successful Bidder and Award of Contract
- Administration of the Contract so awarded
- Contract Closure


# Mapping the Procurement Life Cycle:



↑  
Contract Award

↑  
Contract Administration





Focus Area:  
*the Revised Draft  
Public Procurement Bill*



# Contract Administration:

- Section 16: Terms and Conditions of procurement contracts to be prescribed later
- Section 2(r): Definition of Procurement Process
  - The process of procurement extending from the issue of invitation to pre-qualify or to register or to bid till the award of the procurement contract
- Implications
  - The Bill does not appear to extend to the post-award phase of procurement contracts
    - *Timely Inspections and Payments*
    - *Rules for Contract Changes and Modifications*
    - *Rules for Termination*
    - *T4D, T4C*
  - Issue of regulations or executive orders under the Bill/ Act covering post-contract issues liable to be challenged as outside of the scope of the Bill/ Act

# Coverage and Bidder Eligibility under the Revised Draft of the Bill:

- Bidder Participation Criteria
  - *Forbids discrimination amongst bidders or any categories thereof on any basis other than the ones permitted under the Bill (Section 6)*
- Bidder Qualification Criteria
  - *Requires evaluation of bids strictly in conformity with the requirements imposed under the Bill (Section 7)*

# Draft Public Procurement Bill:

- Section 4(1)(b): Procuring entity to provide fair and equitable treatment to all bidders
- Section 6(1): Procuring entity shall not establish any requirement aimed at limiting participation of bidders that discriminates
  - *Section 6(2)(a): Mandatory procurement and price preference is permitted to any category of bidders for, inter alia, the promotion of domestic industry, provided that such notification contains reasoned justification*
- Section 7(4): Procuring entity shall evaluate the qualification of bidders only in accordance with specified requirements (in this section)

# International Comparisons—De Jure Treatment of Foreign Bidders:

- China: *Mandatory procurement of Chinese goods, works and services PLUS capability to assume civil liability PLUS...*
- The EU: *Non-discrimination amongst EU Member-States and only to the extent obligated under the GPA*
- The US: *The Walled Garden—non-discriminatory treatment to bidders from GPA Member-States above agreed thresholds and for agreed categories; and also other bilateral obligations of the US*
- France: *Mandatory Contract Splitting*
- Canada: *Limited Participation under its Bilaterals, Restricted Complaints even for eligible foreign bidders*

# Implications of Scope Issues:

- Strict criteria for determination of eligibility, discrimination prohibited other than on listed grounds: likely to enhance competition somewhat in general
- Apparent extension to all bidders irrespective of nationality
  - *Foreign bidder participation as a default position*

# Mechanisms for Procurement Grievance Redressal:

- Sets up a basic mechanism for grievance redressal in the form of *multiple* Procurement Redressal Committees—PRCs (Section 39)
- No apparent requirements for recommendations of PRCs to make available their recommendations to either the public or the complainant
- Procuring entities can possibly be *spirally* challenged by dissatisfied bidders before PRCs
  - *Section 39(14): The Grievance Redressal Committee (GRC) shall make its recommendation on action to be taken by the procuring entity*
  - *Section 39(15): The procuring entity shall communicate its decision thereon within fifteen days*
  - *Section 40: No bar placed on the applicant challenging the decision of the procuring entity issued under §39(15) before the GRC*

# Sanctity of Bids:

- Conducting Price Negotiations
  - *Section 15: ...in such circumstances and under such conditions as may be prescribed, no price negotiations shall be held by a procuring entity with a bidder with respect to a bid presented by him...*
- Cancellation of the Procurement Process
  - *Section 27: Grounds for cancellation not specified*

# Coverage of CPSEs:

- Section 3(2)(b): All procurement actions of CPSEs covered, *irrespective* of the procurement actions being *commercial* or *governmental* in nature
- International Comparisons
  - The *Petroleos Mexicanos (Pemex)* Law (Mexico)
  - Utilities Directives (EU)
  - The *Pertobras* Law (Brazil)



# Assessing the overall implications for Competition:

- More or Less?



Q&A?



- Thank You

[www.BuyLawsIndia.com](http://www.BuyLawsIndia.com)